IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-478219-D2 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Frank Joseph SCHANDL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1696

Frank Joseph SCHANDL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 1 March 1967, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for 6 months on 12 months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as boatswain on board the United States SS PECOS under authority of the document above described, on or about 8 February 1967, Appellant assaulted and battered by beating with his fists a fellow crewmember, Gilbert RIEGEL, Ablebodied seaman.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification

The Investigating Officer introduced in evidence the testimony of the chief mate of the vessel.

In defense, Appellant offered in evidence the testimony of three witnesses, and testified in his own behalf.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months on twelve months' probation.

The entire decision was served on 7 March 1967. Appeal was timely filed on 3 April 1967. Although Appellant requested and was provided with a copy of the transcript of proceedings, no further material in support of the appeal has been received.

FINDINGS OF FACT

On 8 February 1967, Appellant was serving as boatswain on board the United States SS PECOS and acting under authority of his document while the ship was in the port of Oakland, California. On that date, AB seaman Gilbert Riegel returned to the vessel late for his watch. Appellant had been forced to stand by for Riegel during his absence. Riegel was intoxicated and was extremely abusive to Appellant.

Appellant, who was extremely angry, said, "Gil, I'm getting tired of this, knock it off. Either take a swing at me or knock it off. I'm getting tried of this." Appellant turned away and Riegel seized him from behind, grabbing at Appellant's face and scratching him. Appellant shoved Riegel to the deck and got on top of him. He slapped Riegel in the face, while shouting at him, got up, and left as the chief mate approached the scene. The chief mate found Riegel unconscious.

Riegel was taken to the Public Health Service Hospital in San Francisco, but left there against medical advice without treatment.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner made three errors:

> (1) he was wrong in assuming that Appellant had invited an attack upon himself;
>
> (2) he erred in concluding that Appellant had used more force than necessary in repelling the attack; and
>
> (3) he should not have proceeded with the hearing without requiring the presence of Riegel as a witness.

Appellant also urges that the order is excessive and that "a reprimand would be sufficient for any alleged misconduct."

APPEARANCE: Ed. S. Atkinson, Esq., Houston, Texas

OPINION

I

The first consideration will be given to the amount of force which Appellant used against Riegel.

The Examiner has used the following language:

(1) "Schandl then struck Riegel, knocking him to the deck and knocking him out. Schandl then got on top of Riegel and continued to strike him while Riegel was unconscious."

(2) "Although this witness [Appellant] has indicated that he struck Riegel only once, the chief mate testified that he saw Schandl slap Riegel in the face when Riegel was down on the deck."

(3) "There is no doubt but that Riegel was knocked out, but the bosun continued to work him over."

(4) ". . . several persons saw him strike Riegel who was lying on his back unconscious."

(5) ". . .after knocking Riegel to the deck, he continued to strike the man using far more force than was necessary to repel any attack."

(6) ". . . there was thereafter no justification whatever for the person charged to get on Riegel, lying there unconscious, and continue to further beat him."

No witness who testified at the hearing, except for Appellant, saw anything that happened before Riegel was on the deck with Appellant over him.

Appellant says that he "shoved" Riegel, got on him after he had fallen to the deck, and slapped his face once.

The chief mate testified:

> "I saw the Boatswain slap him, but I didn't see the beginning of it. I was there just at the end when Riegel was on the deck and Schandl slapped him in the face." R-5.

The witness Todd said:

> "I seen the Boatswain slap him while he was talking to him." R-20.

From this meager evidence, it cannot be inferred that "several persons" saw Appellant strike an unconscious man, nor that Appellant "worked over" or "continued to beat" his victim. There is evidence of only one blow, a slap in the face.

II

The mere fact that Riegel was rendered unconscious does not prove anything. There is evidence, accepted by the Examiner, that Riegel was staggering drunk at the time. There is no evidence that Appellant struck him such a blow as to "knock him out." It is consistent with the facts in evidence that the "shove" which Appellant testified to and the falling of the drunken man to the deck could have produced unconsciousness. Significantly, there is no evidence of any blood or bruises or mark of any kind on Riegel.

In this connection, Appellant's reference to the failure of Riegel to appear as a witness takes on some importance. the hearing was held the day after the episode occurred. In his summation, the Investigating Officer said:

> " . . . due to the serious nature of this assault and battery, and further that Mr. Riegel was taken to the hospital, apparently in an unconscious condition, the Coast Guard believes that some definite penalty is in order. However, it does recommend leniency because of this and the fact that Mr. Riegel has at no time contacted the Coast Guard, and left the Public Health Service Hospital without proper medication and treatment." R-37.

At this point, the Examiner asked, "Was Riegel requested to contact the Coast Guard, at any time?" The reply was, "No sir, he was not."

However, Appellant had testified, without contradiction, "Mr. Riegel came aboard today, sir." R-36. (the hearing commenced at 1430 that day.) Had Riegel been summoned to the hearing it might have been found that the "proper medication and treatment" he declined to accept were for an acute alcoholic condition and nothing else.

While assault and battery can be proved, like unlawful homicide, without the testimony of the victim, under the circumstances of this case it appears to have been a grave deficiency not to have produced Riegel at the hearing.

III

While the single slap in the face which was proved does not add up to "using far more force than was necessary to repel any attack," the Examiner also found a basis for assault and battery in that Appellant had invited an attack upon himself by challenging riegel to fight.

We know of this possibility only through the testimony of Appellant himself. While it is possible in these proceedings to predicate findings solely upon the testimony of a person charged who was voluntarily taken the stand, I believe that in a doubtful case like this, especially when the party is without counsel, a single item of testimony should not be isolated and construed as strongly as possible against the party, but that the entire context of his testimony must be examined.

It is true that Appellant did testify to making the statement, "Either take a swing at me or knock it off. I'm getting tired of this." R-33. But it is also true that Appellant testified at the same point that after using these words he turned away from Riegel and was leaving the scene when he was seized from behind. He testified also that after he had shoved Riegel off, Riegel hit the bulkhead and went to the deck, and that he then got on Riegel "because I wasn't going to give him a second chance."

These are not the words of a man who was seeking a fight. They are the words of one who believed that he had been unjustly attacked and wished to prevent a second attack.

If a person invites mutual combat and one ensues it is true that both participants are wrong, and "self-defense" cannot be brought in. But an invitation to fight, if one is seriously made, contemplates face to face combat, as Appellant urges, not a "jumping" from behind. To give an exaggerated example; if one seaman were to invite another "to the dock" and the invitee, following his challenger down the gangway, struck him on the head with a piece of pipe and rendered him unconscious, it could scarcely be said that the unconscious man had engaged in mutual combat although such been his intention.

On the evidence here, the words used by Appellant may have been intemperate. Whatever he may have meant, they did not invite what followed, a clawing of the face from behind. The Examiner has correctly stated the theory: "No matter what words were used by Riegel to the bosun, they did not justify an assault and battery." Just so, whatever words Appellant used to Riegel did not justify Riegel's assault and battery upon him from behind after he had turned away, and self-defense was properly in issue.

IV

The assumption is made throughout by the Examiner that Riegel was unconscious when he hit the deck. The assumption was made by the Investigating Officer, as previously mentioned, that when Riegel was removed to the hospital he was "apparently in an unconscious condition."

Appellant testified that when he "got on top of" Riegel, "He still had his eyes open looking at me and I said, `Gil, stop that. I'm getting tired of that. Get off my back and shut up.'" R-33. Todd testified that when Appellant slapped Riegel's face he was saying, "`Listen to me. Can you hear me? Do you hear me?' I can't remember the exact words." R-20. Todd also testified that while Riegel appeared to be unconscious when he first saw him on deck, Riegel regained consciousness in about "five minutes" (R-21), which was well before he left the ship. From the testimony of the chief mate there appears little doubt that Riegel was unconscious when he reached him, after Appellant had got up and left.

The question of Riegel's unconsciousness seems to have weighed heavily with the Investigating Officer as he argued the serious nature of the assault and battery. It also weighed heavily with the Examiner in his reiterated descriptions of Appellant's "working over" his victim. In light of what has been said above, neither of these considerations is of any importance. What is important now is the evaluation of the slap in the face that Appellant admittedly gave to Riegel.

If the slap is to be construed as a technical assault and battery, it could be that Appellant's contention that a reprimand, or "admonition" as such action would be called in these proceedings, would be sufficient. It does not, however, appear to be in order so to construe it.

A slap in the face of a person obviously losing consciousness in order to get attention to something important that is being said is a device frequently resorted to. Appellant had an important communication to make to Riegel, important, that is, under the circumstances. There is no evidence of repeated slaps, amounting to a "beating."

Considering the unblemished record of Appellant over a period of over twenty years in the merchant service, I am not inclined to place upon his record even an admonition for what would be in the law of torts no more than a technical assault and battery and might even be considered an act constructively consented to.

V

It is obvious that the record in this case does not support the language of the specification that there was a beating with "fists." There is testimony only that there was a "slap;" and a slap is made with an open hand, not with a fist. A single slap does not constitute a "beating."

It may well be that Appellant's conduct in fact might have justified the Examiner's feeling that a brutal vicious beating, in uncontrolled rage, took place. If such was the case, the record before me does not reflect the facts.

CONCLUSION

For the reasons stated above, I conclude that the charges in this case should be dismissed.

ORDER

The order of the Examiner entered at San Francisco on 1 March 1967 is VACATED; the findings are REVERSED; the charges are DISMISSED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C. this 4th day of April 1968.

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